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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-954

WESTERN FUELS ASSOCIATION, INC. and
MOON LAKE ELECTRIC ASSOCIATION, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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INTRODUCTION

Western Fuels Association, Inc. (Western Fuels) and Moon Lake Electric Association (Moon Lake) have filed a petition seeking review of one question: Whether intervention may be denied where intervention is sought after judgment has been entered in the district court and where the parties to the action jointly seek an amended judgment in the district court which will substantially, materially and adversely affect the rights of the applicant for intervention.

The federal respondents filed a brief in opposition to Western Fuels' and Moon Lake's petition. The respondents Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., Northern Plains Resource Council and Powder River Basin Resource Council filed no brief in opposition. Rather, by a pleading dated February 21, 1979, those respondents adopted the position of the federal respondents and urged denial of the petition for a writ of certiorari. Thus, the comments here relate solely to the federal respondents' brief.

In large part, Western Fuels' and Moon Lake's petition adequately answers the contentions raised by the federal respondents. However, clarification is necessary on two points raised by the federal respondents.

ARGUMENT

Both in the "Statement" and "Argument" sections of the federal respondents' brief, there are assertions that intervention by Western Fuels and Moon Lake would result in the reopening of prior decisions on key issues, to the prejudice of existing parties to the litigation. This key prior issue is whether the Secretary of the Interior has a mandatory, non-discretionary duty to issue leases to preference right lease applicants who have made the showings required by Section 2(b) of the Mineral Leasing Act of 1920[1] and by relevant Interior Department regulations.[2]

[1] 30 U.S.C. § 201(b).

[2] 43 C.F.R. § 3520.1-1.

In their *initial* papers filed in the proceedings below, Western Fuels and Moon Lake indicated that the "lease issuance" issue would be raised. However, *prior to* the specific decisions of the District Court and the D.C. Circuit for which review is sought here, Western Fuels and Moon Lake made it clear beyond peradventure that the "lease issuance" issue would not be raised or litigated should their intervention be granted.

In their May 30, 1978 supplemental memorandum[3] to the District Court, Western Fuels and Moon Lake stated:

> Western Fuels and Moon Lake take this opportunity to clarify beyond any doubt the extent to which they seek to participate in this proceeding should intervention be granted.
>
> * * *
>
> Western Fuels and Moon Lake's participation will be related solely to the proposed modification of order. They will seek to have this Court conduct an evidentiary hearing prior to its approval of the proposed modification of judgment. They will seek to have this Court consider their arguments in opposition to the proposed modification of judgment on the grounds stated in other pleadings already on file with this Court as supplemented and limited by this supplemental memorandum.

In even more explicit fashion, Western Fuels and Moon Lake stated to the Court of Appeals:

> We concede that as respects a challenge to the injunction against *issuance* of preference right

[3] Supplemental Memorandum of Western Fuels Association, Inc. and Moon Lake Electric Association in Support of Their Reinstated Motion to Intervene, filed May 30, 1978, United States District Court for the District of Columbia, Civil No. 75-1749, at 7-8.

leases, our intervention would be untimely, and in any event our interests would be adequately represented by Utah Power and Light. But, for the reasons herein stated, intervention by Western Fuels and Moon Lake for purposes of challenging the proposal to amend the September 27, 1977 order to prohibit *processing* of preference right lease applications, which processing was underway but came to a screeching halt by reason of the federal defendants' self-inflicted "settlement" wound, is timely under *Costle, supra.*[4]

It is axiomatic that litigants must take affirmative actions to preserve issues for judicial decision and review. *See, e.g., Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976); *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976); *United States* v. *American Ry. Express Co.,* 265 U.S. 425, 435-36 (1924). Here, Western Fuels and Moon Lake are not only abandoning the "lease issuance" issue, but are actively abjuring and renouncing any reliance on that issue.

Despite these actions, the "lease issuance" issue remains like an albatross and has tainted the participation of Western Fuels and Moon Lake at all levels of this litigation. To the extent that the federal respondents rely on this rejected "lease issuance" issue as a tool to oppose the petition, that reliance is improper. This line of attack on the petition should be disregarded.

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[4] Response of Western Fuels Association, Inc. and Moon Lake Electric Association (Appellants in No. 78-1780) to Order to Show Cause Dated August 25, 1978, filed September 8, 1978, United States Court of Appeals for the District of Columbia Circuit, No. 78-1780, at 13-14. The *Costle* case referred to in that quotation is *Natural Resources Defense Council, Inc.* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977).

The second area of clarification concerns the timing of Western Fuels' and Moon Lake's initial petition to intervene before the District Court. The federal respondents argue on pages 8 and 9 of their brief that the federal defendants' change in litigation position occurred substantially before Western Fuels and Moon Lake sought to intervene before the District Court. The record reflects otherwise.

An analysis of the history of the litigation indicates that the initial petition to intervene was filed within ten days of formal notification of the federal defendants' changed position. The underlying litigation was initiated on October 21, 1975. The federal defendants below actively and forcefully litigated that case. On cross-motions for summary judgment, the District Court entered its order in favor of the plaintiffs on September 27, 1977. The federal defendants filed a timely notice of appeal. The next formal action undertaken in the litigation was the joint filing of a Rule 60(b) motion by the plaintiffs and federal defendants on March 3, 1978, whereby the District Court, other parties, and interested persons such as Western Fuels and Moon Lake, first received notification of the change in the federal defendants' litigation stance. Prior to the filing of that motion, the federal defendants were appellants seeking to overturn the adverse District Court determination. Indeed, assuming that Western Fuels and Moon Lake had any information that federal defendants were considering undertaking a change in position, intervention into the lawsuit by Western Fuels and Moon Lake based upon that potential change in position could have been declared premature prior to formal action by the federal defendants.

Further, during the time period between the September 27, 1977 District Court decision and the filing of the March 3 joint motion, actions within the Department of Interior reflected that the federal defendants had not altered their position on the processing of federal preference right lease applications.[5] Only after the execution of the agreement and the filing of the joint motion under Rule 60(b) did the *processing* of lease applications cease.

Since, as shown above, Western Fuels and Moon Lake seek intervention to object to the cessation of the processing of preference right lease applications, their initial petition to intervene, filed ten days after notice of the federal defendants' decision to terminate lease processing, must be deemed timely.

Obviously, Western Fuels and Moon Lake request that the Court grant their petition for a writ of certiorari. However, they also urge that additional relief from this Court is appropriate and they request summary reversal of the judgment below.

First, Western Fuels and Moon Lake submit that a review of the petition and opposing brief reflect that the respondents have totally failed to distinguish this case from cases decided by this Court and other courts where intervention was granted.[6] Additional review of the factual analyses and legal arguments is unnecessary to decide this case. Also, Western Fuels and Moon

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[5] A summary of these actions is found on pages 7 and 8 of Western Fuels' and Moon Lake's petition.

[6] *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977); *Stallworth* v. *Monsanto*, 558 F.2d 257 (5th Cir. 1977); *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976) *aff'd* 432 U.S. 385 (1977).

Lake will be injured by the passage of time during which this Court deliberates the merits of the petition, while the parties prepare briefs and until the case is finally decided. As reflected in the federal respondents' brief, the underlying litigation is moving forward. If Western Fuels and Moon Lake are to receive any benefit from intervention in the case, that intervention must occur, at the latest, while the case is still pending before the D.C. Circuit. Summary reversal is both appropriate and necessary in this case.

CONCLUSION

For these reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the District of Columbia Circuit be summarily reversed, or, in the alternative, that a writ of certiorari issue to review that judgment.

Respectfully submitted,

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